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The Political and Economic Roots of the "Adversary System" of Justice and "Alternative Dispute Resolution"

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In recent years, countless commentators have discussed at great length the "adversary system" of justice and the competing system of "alternative dispute resolution." Most of these commentators, however, have analyzed these competing systems in an intellectual vacuum. These two systems of dispute resolution, commentators seem to suggest, are completely unrelated to anything outside of the field of law itself. The present analysis of the adversary system and ADR differs considerably. First, it demonstrates that "adversary justice" and "alternative dispute resolution" are closely related to political and economic structures in the United States. Second, it argues that decisions about the value of these competing systems must not be made solely in light of philosophic principles. Rather, such decisions should be made in light of evidence from the worlds of physical and social science.

I. INTRODUCTION

Anyone who is familiar with the literature of legal ethics knows that a number of commentators have produced a seemingly endless supply of analysis regarding the "adversary system of justice" and "alternatives" to that system.[1] Much of that analysis, at least that directly related to the

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1. Perhaps the best concise discussion of the adversary system of justice, and alternatives thereto, can be found in books generally dealing with legal ethics. *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986); *see also* MICHAEL DAVIS AND FREDERICK ELLISTON, ETHICS AND THE LEGAL PROFESSION (1986); GEOFFREY C. HAZARD AND WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (1987); GEOFFREY HAZARD, & DEBORAH C. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (2d ed. 1988). Other brief, yet

adversary system itself, is recounted in a recent book devoted solely to a discussion of the adversary system of justice.[2] In this book, Professor Landsman notes that this system has three distinguishing characteristics. First, this system requires neutral and passive decision makers, usually

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comprehensive discussions of these topics can be found in texts on civil procedure. *See, e.g.*, FLEMING JAMES, JR. AND GEOFFREY HAZARD, CIVIL PROCEDURE § 1.2 (3d ed. 1985). For some of the most widely discussed articles on these topics, particularly the adversary system of justice, see AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE 56-60 (1974); A. Sherman Christensen, *Some Reflections on the Nature of the Future of the Adversary System*, 30 DEF. L. J. 325 (1981); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); Henry S. Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STAN. L. REV. 349 (1952) (Drinker was one of the first writers systematically to study the field of legal ethics in America.); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060 (1976); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference: Professional Responsibility*, 44 A.B.A. J. 1159, 1160-61 (1958); John B. Mitchell, *The Ethics of the Criminal Defense - New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980); John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966); Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307 (1988); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986); Gerald J. Postema, *Moral Responsibility and Professional Ethic*, 55 N.Y.U. L. REV. 63 (1980); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975); James B. White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849 (1983). For additional recent discussions, see Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939 (1988); R.J. Gerber, *Victory vs. Truth: The Adversary System and its Ethics*, 19 ARIZ. ST. L.J. 3 (1987); Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367 (1992); George Rutherglen, *Dilemmas and Disclosures: A Comment on Client Perjury*, 18 AM. J. CRIM. L. 319 (1991); Stephen A. Salzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647 (1986); Ted Schneyer, *Uniting the Balkans: Wolfram on Legal Ethics*, 37 J. LEG. EDUC. 434 (1987); Harry I. Subin, *The Criminal Lawyer's Mission: Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987).

Several other comprehensive works cite much additional literature on the adversary system. *See* Gary Goodpaster, *On the Theory of American Adversary Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118 (1987); Gary Goodpaster, *The Adversary System Advantage and Effective Assistance of Council in Criminal Cases*, 14 N.Y.U. REV. OF L. & SOC. POL'Y 59 (1986); *see also* FREDERICK A. ELLISTON & JAN VAN SCHAICK, LEGAL ETHICS: AN ANNOTATED BIBLIOGRAPHY AND RESOURCE GUIDE (1984); Erwin Chereminsky, *Pedagogy Without Purpose: An Essay on Professional Responsibility Courses and Case Books*, 1985 AM. B. FOUND. RES. J. 189.

2. STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1988) [hereinafter READINGS].

judges or jurors.[3] Second, the adversary system of justice requires party presentation of evidence in a competitive setting.[4] In other words, parties or lawyers present conflicting versions of the facts and the law. Finally, the adversary system of justice involves highly structured forensic procedures.[5] These highly structured procedures are necessary, Landsman suggests, because "adversary procedure exacerbates the natural tendency of advocates to seek to win by any means available."[6]

Countless criticisms and defenses of the adversary system of justice exist.[7] Again, thankfully, Landsman provides an exhaustive summary of these criticisms and defenses.[8] The adversary system, many critics have noted, is slow to operate and displays a seeming lack of interest in discovering material truth. Furthermore, access to the system by anyone except the wealthy is difficult, and the system exacerbates the power of lawyers and the conflicting responsibilities of judges. Conversely, many writers argue that the system has considerable strong points, points that can perhaps best be discussed in terms of what are sometimes called "consequentialist" and "non-consequentialist" defenses. Consequentialist defenses of the adversary system are defenses that rely upon claims that the adversary system best accomplishes the kinds of things that lawyers are called upon to do: that it is the best way to

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3. *Id.*

4. *Id.*

5. *Id.*

6. Professor Wolfram provides a similar, albeit different list of attributes of the adversary system, as do countless other writers. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.1 (1986).

7. LANDSMAN, READINGS, *supra* note 2, at 4-5. Countless criticisms and defenses of the adversary system of justice have been put forward. Thankfully, however, Landsman provides an exhaustive summary of these criticisms and defenses. A similar exhaustive discussion of these criticisms and defenses has also been provided by David Luban. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY, 67-103 (1988). The adversary system is slow to operate, some critics suggest, and displays a seeming lack of interest in discovering material truth. Further, other critics argue that access to the system by anyone except the wealthy is difficult, and that the system exacerbates the power of lawyers and the conflicting responsibilities of judges. Defenders of this system, however, counter with two different kinds of arguments. Some defenders put forward "consequentialist" defenses of this system, defenses that rest upon claims that this system best accomplishes the kinds of things that lawyers are called upon to do. The adversary system, these consequentialist defenders claim, is the best way to produce truth, or that it is the best way to defend legal rights. *See id.* at 68, 74. Other defenders of the adversary system advance "non-consequentialist" defenses, defenses that do not look to the consequences produced by use of the system. The adversary system is intrinsically good, some non-consequentialists argue. *Id.* at 83. Others suggest that this system is most consistent with human dignity. *Id.* at 85.

8. THE GOOD LAWYER 67-103 (David Luban ed., 1984).

produce truth,[9] for example, or that it is the best way to defend legal rights.[10] Non-consequentialist defenses, in turn, are defenses that do not look to the things actually accomplished by the system. Rather, these defenses concentrate on the underlying nature of the system itself. That the system is intrinsically good[11] might be one non-consequentialist defense of the adversary system, as might be an argument that the adversary system is the "dispute resolution system" most consistent with human dignity.[12] Another non-consequentialist defense of the adversary system is that the system is, somehow, an integral part of the social fabric of Anglo-American society.[13]

A critically important point must now be made. Given the breadth of analysis just described, and the number of citations already provided, it hardly seems possible for anybody to say anything new about this topic. Therefore, anybody contemplating yet another discussion of this topic perhaps should think about Winston Churchill's advice about physical exercise. Whenever he felt the desire to exercise, Churchill noted, he would simply lie down until that desire went away. Interestingly, however, one somewhat new point in this context can be explored further. This point has been hinted at repeatedly in connection with discussions of the adversary system and its alternatives but has been quickly dismissed before it could be developed fully.

II. THE ROOTS OF THE ADVERSARY SYSTEM OF JUSTICE

Numerous commentators on the history of the adversary system of justice have noted that the present-day adversary system is not nearly as ancient as it is usually thought to be.[14] Rather, what we now know as

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9. *Id.* at 68.

10. *Id.* at 74.

11. *Id.* at 83.

12. *Id.* at 85.

13. THE GOOD LAWYER, *supra* note 8, at 87.

14. For elaborate discussions of the history of the adversary system of justice, see STEPHAN LANDSMAN, THE ADVERSARY SYSTEM (1984); ROSCOE POUND, JURISPRUDENCE 696-703 (1959); Stephan Landsman, *The Decline of the Adversary System and the Changing Role of the Advocate in That System*, 18 SAN DIEGO L. REV. 25 (1981) [hereinafter Landsman, *Decline of the Adversary System*]; David Luban, *Calming the Hearse Horse*, 40 MD. L. REV. 451 (1981); Robert W. Millar, *The Formative Principles of Civil Procedure*, 18 ILL. L. REV. 1 (1923); Stuart Neef & Marian Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y.L. F. 123 (1972); Noonan, *supra* note 1; Penegar, *supra* note 1; Roscoe Pound, *Do We Need a Philosophy of Law*, 5 COLUM. L. REV. 339 (1905); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L.

the adversary system was preceded by what Landsman calls "pre-adversarial" dispute resolution procedures.[15] In earliest times, disputes were resolved through a process called "trial by battle."[16] People themselves, or the "champions" that individual people employed, literally fought things out in formalized settings. As society itself became less violent, however, trial by battle was replaced by "trial by ordeal."[17] In trial by ordeal, people prevailed by establishing that they could withstand physical pressure, or even torture. Eventually, however, words replaced force in connection with the resolution of disputes. Further, and perhaps more significantly, informal dispute resolution, often under the auspices of important people in the community, gradually became an important dispute resolution technique.[18] Thus, gradually, people started to argue things out rather than fight. Finally, juries appeared, first connected to the parties themselves and then independently of the parties.[19]

Adversarial proceedings themselves did not fully develop until the eighteenth and early nineteenth centuries in Europe.[20] Landsman notes that the eighteenth and nineteenth centuries in Europe were times of "intense social and economic ferment."[21] Dramatic calls for fundamental changes in the organization of society itself were continuously made.[22] Landsman then makes a cryptic point: "The special needs of eighteenth and nineteenth century society accentuated the adversarial aspects of Anglo-American judicial procedure."[23]

REV. 494 (1986); Showell Rogers, *The Ethics of Advocacy*, 15 LAW. Q. REV. 259 (1899). *See also* PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION (1992) (discussing very early days of Western legal system in Europe); KENNETH KIPNIS, LEGAL ETHICS (1986); Edmund Byrne, *The Adversary System: Who Needs It?*, 6 AM. LEGAL STUD. ASS'N F. 1 (1982); William C. Heffernan, *The Moral Accountability of Advocates*, 61 NOTRE DAME L. REV. 36 (1985); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983).

15. LANDSMAN, READINGS, *supra* note 2.

16. *Id.*

17. *Id.*

18. Mediation, according to Professor Becker, who relies upon the work of Professor Auerbach, was the major, if not dominant form of dispute resolution in seventeenth century America. Theodore Becker, *Conflict and Paradox: The New American Mediation Movement: Status Quo and Social Transformation*, 1986 MISS. J. DISP. RES. 109, 111.

19. LANDSMAN, READINGS, *supra* note 2.

20. *Id.*

21. *Id.* at 19.

22. *Id.*

23. *Id.* Landsman briefly returns to this same point later in his book when he describes a number of recent "non-adversarial reforms" in the American legal system. *Id.* at 21. In a number of settings, he notes, courts in the United States have abandoned adversarial

Interestingly, a number of commentators other than Landsman have hinted at the possible importance of the precise time at which adversarial procedures as they now exist finally developed. These commentators briefly suggest that dispute resolution systems in a society almost certainly reflect larger aspects of the society generally.[24] Several commentators, for example, have explicitly noted that a connection might exist between the adversary system of justice and the principles of laissez-faire economics, principles that flourished in the eighteenth and nineteenth centuries in Europe.[25] Other commentators have at least hinted at this

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techniques. "This trend," he continues, "did not begin recently. It has grown out of social and economic forces that have been building for a long time." *Id.* Landsman provides only the briefest explanation of what those societal forces are. "The individualistic adversarial approach is," he suggests, "to a significant degree, inconsistent with what Max Weber has described as the fundamental requirement of modern 'bureaucratic' government and industry. . . ." *Id.*

24. *See, e.g.*, JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY 168-71 (1981); Richard L. Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 L. & SOC'Y REV. 217, 287, 297-300 (1973); Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 569-70 (1973); Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 257-62 (1986); Jane Mansbridge, *Living with Conflict: Representation in the Theory of Adversary Democracy*, 91 ETHICS 466, 469 (1981); Pound, *supra* note 14, at 344-49; Resnik, *supra* note 14, at 502-07, 517-19, 540-41; Maurice Rosenberg, *Can Court-Related Alternatives Improve Our Dispute Resolution System?*, 69 JUDICATURE 254, 254 (1986); Simon, *supra* note 1, at 62-72.

25. Marvin Frankel, for example, makes this point briefly, but quite explicitly, on a number of occasions. MARVIN E. FRANKEL, PARTISAN JUSTICE 10, 17-18 (1980); Marvin Frankel, *From Private Rights Toward Public Justice*, 51 N.Y.U. L. REV. 516, 516 (1976); Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036-37 (1975). Jerome Frank also makes this point explicitly, but again only briefly. JEROME FRANK, COURTS ON TRIAL 19-20, 92 (1949); *see also* Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEHAV. 121, 123-24 (1982).

Professor Kutak seems to develop this point most fully. Robert J. Kutak, *The Adversary System and the Practice of Law*, *in* THE GOOD LAWYER 172-87 (David Luban ed., 1983). Kutak describes what he refers to as a "competitive model" of adjudication. He concludes this discussion by suggesting that his model explains the most troubling aspect of the adversarial system, namely that lawyers involved in the system generally are thought not to have any moral responsibility personally to seek truth and justice.

> A fundamental characteristic of the competitive theory is that competing individuals have no legal responsibility for the competence of their counterparts on the other side of the transaction and, consequently, have no obligation to share the benefits of their own competence with the other side.

Id. at 174.

connection.[26] In addition, several commentators have alluded to the fact that a connection might exist between the adversary system of justice and ideas about "checks and balances" that flourished in the eighteenth and nineteenth centuries.[27] Finally, a number of commentators have hinted that the adversary system of justice is somehow related to the general

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Then Kutak makes an important observation. It is understood that, while the competitive process may produce more correct economic, political, moral or judicial results, it will not in every instance guarantee a correct result or in every case advance the common interest. Because individual competencies in employing a given process may vary, bad products will sometimes prevail over good products in the marketplace; bad ideas will sometimes prevail over good ideas in the public forum; and bad persons will sometimes prevail over good persons in the judicial process. *Id.*

26. *See, e.g.*, Edmund Byrne, *The Adversary System: Who Needs It?*, *in* ETHICS IN THE LEGAL PROFESSION 185, 213 (Michael Davis et al. eds., 1984); ALAN DERSHOWITZ, THE BEST DEFENSE xviii (1982); MARC A. FRANKLIN, BIOGRAPHY OF A LEGAL DISPUTE 94 (1968); GEOFFREY HAZARD & JAN VETTER, PERSPECTIVES ON CIVIL PROCEDURE 152 (1987) (referring to notion of "self-interest"); KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENE WAY (1941) (self-interest); David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER 83, 100-02 (David Luban ed., 1984); THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 24-25 (1978) (self-interest); Stuart Neef & Marian Nagel, *The Adversarial Nature of the American Legal System: A Historical Perspective*, *in* LAWYER ETHICS 83-87 (Allan Gerson ed., 1980); RICHARD POSNER, THE ECONOMIC ANALYSIS OF LAW 492-93 (1986); ANNE STRICK, INJUSTICE FOR ALL 87 (1977); LLOYD WEINREB, DENIAL OF JUSTICE 109 (1977) (invisible hand); Geoffrey F. Aronow, *The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation*, 7 HASTINGS CONST. L. Q. 739, 748 (1986); Barbara A. Babcock, *Fair Play*, 34 STAN. L. REV. 1133 (1982); Edward F. Barrett, *The Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME LAW. 479, 481 (1962); Wayne D. Brazil, *Special Masters in the Pre-Trial Development of Big Cases*, 1982 AM. B. FOUND. RES. J. 287, 370; Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1024 (1981); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285-86 (1976); Anthony D'Amato & Edward J. Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U. L.J. 761, 769-70 (1983); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1077 (1984); Fiss, *supra* note 25, at 127-28; Fuller & Randall, *supra* note 1, at 1160-61; Landsman, *Decline of the Adversary System*, *supra* note 14, at 254. Penegar, *supra* note 1, at 311. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 840, 847 (1984) (self-interest); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 595 (1985) (free market conception of adjudicative processes); Timothy Wilton, *Functional Interest Advocacy in Modern Complex Litigation*, 60 WASH. U. L.Q. 37, 40 (1982) (self-interest).

27. *See* Louis D. Brandeis, *The Opportunity in the Law*, *in* BUSINESS: A PROFESSION (1914); Alan Donagan, *Justifying Legal Practice in the Adversary System*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1983); Galanter, *supra* note 24; David Luban, *Calming the Hearse Horse*, 40 MD. L. REV. 451, 468 (1981); Mansbridge, *supra* note 24, at 469; Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1296 (1987); Douglas Wells, *Towards a Kinder, Gentler, Legal Profession: A Commentary on Professor Stephen Pepper's "Autonomy, Community, and Lawyers' Ethics,"* 19 CAP. U. L. REV. 967, 970 (1990).

notion of "individualism."[28] Again, the eighteenth and nineteenth centuries in Europe and America were the time and place during which notions of individualism achieved great prominence.

Regrettably, no one to date has examined these connections in detail. Thus no one has shown just how closely the adversary system of justice is linked to important ideas about economics and politics in American society.

III. TWO "MODELS" FOR SOCIAL INSTITUTIONS

In recent years, it has become increasingly clear to those who study western culture that competing conceptions regarding the nature of human beings and the social institutions they form have vied for dominance for thousands of years. These notions can be described respectively as "civic humanism" and "classical liberalism."[29]

A. Civic Humanism

Aristotle and Plato, both claiming to be scientists as well as philosophers,[30] believed that the record of science demonstrates that human beings are intrinsically cooperative, communitarian, and altruistic.[31] This optimistic conclusion about human nature, a conclusion that is often associated with a set of ideas called "civic humanism," dominated Western thought for thousands of years.[32] Christian

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28. *See* Stuart Neef & Marian Nagel, *The Adversarial Nature of the American Legal System: A Historical Perspective, in* LAWYER ETHICS 83 (Allan Gerson ed., 1980); Badcock, *supra* note 26, at 1138-40; Burt, *supra* note 26, at 1024, 1041; Owen M. Fiss, *The Forms of Justice,* 93 HARV. L. REV. 1, 43 (1979); Pound, *supra* note 14, at 344-46; Resnik, *supra* note 26, at 845.

29. The following analysis draws heavily on Paul T. Wangerin, *Four Problems in Professional Ethics,* BUS. & PROF. ETHICS J. (submitted for publication).

30. ROGER MASTERS, THE NATURE OF POLITICS xi (1989).

31. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 109, 189 (1985).

32. Another name for this underlying notion is "republicanism." What were called republican ideas in the eighteenth and nineteenth centuries would today probably be called "liberal" ideas. (Conversely, of course, ideas described as liberal in the eighteenth and nineteenth centuries would today probably be identified as conservative.) Carter Braxton, a signer of the Declaration of Independence and a harsh critic of the tradition of civic humanism, perhaps described that tradition best. To republican ideologues, Braxton wrote:

> Public virtue means a disinterested attachment to the public good, exclusive and independent of all private and selfish interest. A man,

philosophers, for example, at least early ones, subscribed to this optimistic perspective, as did most Medieval thinkers in Western society. Hegel later supported this notion.[33] Even Rousseau, at least in connection with some of his thinking, believed that human beings were not entirely egoistic.[34] Finally, the socialist thinkers,[35] most notably Marx,[36] were

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> therefore, to qualify himself for a member of such a community . . . must not, through ambition, desire to be great, because it would destroy that equality upon which the security of the government depends; nor ought he to be rich, lest he be tempted to indulge himself in those luxuries, which, though lawful, are not expedient, and might occasion envy and emulation.

MCDONALD, *supra* note 31, at 88.

33. MASTERS, *supra* note 30, at 3.

34. *Id.* at 177-80. Although Rousseau did not believe that human being in the state of nature were particularly social. Nevertheless, he also did not believe that they were the egotistic, self-interested individuals that Hobbes, Smith, and Antiphon the Sophist thought them to be. For juxtaposition of Hobbes' ideas and Rousseau's, see BARRY SCHWARTZ, THE BATTLE FOR HUMAN NATURE: SCIENCE, MORALITY AND MODERN LIFE 42-43 (1986).

35. Interestingly, Marxists, and radical thinkers following in the state of nature tradition of Rousseau, were not the only people who doubted that human beings were, by nature, competitive and self interested. Indeed, one of the most powerful early twentieth century attacks on the supposed value of competition came from a surprising direction. In 1923, Frank Knight, one of the early twentieth century's most prominent supporters of capitalist orthodoxy, published a stunning attack on the idea of competition. FRANK H. KNIGHT, THE ETHICS OF COMPETITION AND OTHER ESSAYS (1935). "We appear to search in vain," Knight wrote, "for any really ethical basis for competition as a basis for an ideal type of human relation, or as a motive to action."

> [Competition] fails to harmonize either with the Pagan ideal of society as a community of friends or the Christian ideal of spiritual fellowship. Its only justification is that it is effective in getting things done; but any candid answer to the question, 'what things,' compels the admission that they leave much to be desired. Whether for good or bad, its aesthetic ideals are not such as command the approval of the most competent judges, and as for spirituality, commercialism is in a fair way to make that term incomprehensible to living men. The motive itself has been generally condemned by the best spirits of the race.

Id. at 37-38.

36. Regrettably, most discussions of Marx's work are extremely one sided, being either violently pro or violently con. However, some balanced discussions exists. For a readable discussion, see ROBERT HEILBRONER, MARXISM: FOR AND AGAINST (1980). Joseph Schumpeter also provides enormous insight into Marx's work, strongly critical but at the same time enormously respectful. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 1, 58 (1947). For another very interesting and balanced treatment of Marx work, particularly in contrast to traditional eighteenth and nineteenth century liberalism, see ELLEN F. PAUL ET AL., MARXISM AND LIBERALISM (1986). *See also* DAVID BRAYBROOKE,

the most important modern proponents of the optimistic perspective on human nature. Science itself demonstrates, Marx argued, that human beings are not "isolated atoms in society."[37] Rather, science shows that human beings are an ensemble of social relations.[38] These scientific facts, Marx concluded, should compel societies to create social institutions that rest on communitarian rather than individualistic ideals.[39]

It must now most forcefully be noted that many modern people who do not subscribe to Marx's specific ideas about politics and economics still share with Marx -- and Hegel and Rousseau and the Christian philosophers -- the general civic humanism perspective regarding human nature itself. This is so, of course, because civic humanism merely requires proponents to believe: (1) that human beings are, by nature, cooperative and altruistic, (2) that human beings do not act ethically if they put their own interests wholly ahead of the interests of others, and (3) that social institutions should reflect the altruistic and cooperative nature of human beings.[40]

It is hardly necessary to say that the notion of civic humanism and its underlying ideas present an extremely attractive model for human society. Obviously, cooperation is a good thing among people, and something to be encouraged. Altruism is also a good thing and should be encouraged. Not surprisingly, many modern commentators on various aspects of professional ethics advance arguments that rest, in effect, on the tenets of civic humanism. For example, many modern commentators on business ethics argue that business people have "social responsibilities," which make them responsible to the general public as well as to the

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ETHICS IN THE WORLD OF BUSINESS (1983). Braybrooke reprints an important fragment from Marx's notebooks on "Free Human Production," a fragment that perhaps best explains Marx's moral objections to market economics. *Id.* at 24. Interestingly, Braybrooke juxtaposes this passage from Marx against Frank Knight's classic free market attack on the competitive ideology. *Id.* at 27; *see also* Morris, *Book Review,* 2 BUS. & PROF. ETHICS J. 3, 69 (1983).

37. HEILBRONER, *supra* note 36, at 160.

38. *Id.* Marx perhaps best captured the essence of his ideas about the cooperative nature of human beings in a metaphors, surprisingly, about bees. "A spider conducts operations that resemble those of a weaver," Marx wrote, "and a bee puts to shame many an architect in the construction of its cells." *Id.* at 149.

> But what distinguishes the worst of the architects from the best of the bees is this, that the architect raises his structure in imagination before he erects it in reality.

Id.

39. *Id.*

40. *Id.*

businesses they represent.[41] These commentators insist that the search for profits must not take precedence over everything else. In addition, many modern commentators on political ethics argue that politicians and other government officials must consider the public interest as well as their own private interest.[42] Anything else, these writers suggest, is unethical.

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41. An enormous amount of writing has been done in recent years on the topic of what is generally called "corporate social responsibility." Most of this writing suggests that business people indeed do have social responsibilities. For recent discussions, see R. EDWARD FREEMAN & DAVID GILBERT, CORPORATE STRATEGY AND THE SEARCH FOR ETHICS 88-106 (1988); ROBERT JACKALL, MORAL MAZES: THE WORLD OF COMPETITIVE MANAGERS 199-204 (1988). One book deals exclusively with this subject. RICHARD N. FARMER, CORPORATE SOCIAL RESPONSIBILITY (2d ed. 1985). For the best introductions to this whole area, see THOMAS DONALDSON, CORPORATIONS AND MORALITY 59-108 (1982); PATRICIA WERHANE & KENDALL D'ANDRADE, PROFIT AND RESPONSIBILITY: ISSUES IN BUSINESS AND PROFESSIONAL ETHICS (1985). For provocative discussions, see TOM L. BEAUCHAMP & NORMAN E. BOWIE, ETHICAL THEORY AND BUSINESS 52-127 (2d ed. 1983) (Beauchamp and Bowie are well known writers in the field of business ethics.); JACK N. BEHRMAN, DISCOURSES ON ETHICS AND BUSINESS 67-78, 95-158 (1981) (a particularly interesting discussion). Many other related works are noted in an extensive bibliography of business ethics. A BIBLIOGRAPHY OF BUSINESS ETHICS 1981-85 (Donald Jones & Patricia Bennett eds., 1986).

An important distinction in the terminology of business ethics must now be noted. Socially "responsive" businesses are not necessarily socially "responsible." Many business people and corporations, responding to social pressure, contribute large sums of money to charitable organizations or other not-for-profit entities. Furthermore, many business people and corporations, responding to social pressure, recall from sale products that have generated poor publicity, even if no enforceable statute or regulation requires that recall. Most of the time, however, business people and corporations do these things because they realize that long term goals and profits can be jeopardized by failure to act in ways that are consistent with the public's expectations. In short, they are not motivated by a sense of social responsibility, but by the realization that their long term best interests are best served by doing what may be socially responsible. Yet, corporate social responsibility does occur when businesses engage in some kind of act purely for altruistic reasons, and self-interest is not a factor. For example, a socially "responsible" business person might voluntarily stop operating a polluting factory simply because that business person believes in keeping the natural environment as pure as possible.

42. Again, the general literature on the ethical responsibilities of public officials is immense. Ostrum and Chandler, however, are perhaps the most important writers on the subject generally of political ethics. *See, e.g.*, Ralph C. Chandler, *Dealing with Ethical Issues and Value Conflicts, in* MANAGING PUBLIC PROGRAMS: BALANCING POLITICS, ADMINISTRATION AND PUBLIC NEEDS 102-20 (Robert E. Cleary & Nicholas Henry eds., 1989); VINCENT OSTRUM, THE INTELLECTUAL CRISIS IN AMERICAN PUBLIC ADMINISTRATION 116-138 (1989); *see also* KATHRYN G. DENHARDT, THE ETHICS OF PUBLIC SERVICE: RESOLVING MORAL DILEMMAS IN PUBLIC ORGANIZATIONS, (1988); BRUCE JENNINGS & DANIEL CALLAHAN, REPRESENTATION AND RESPONSIBILITY: EXPLORING LEGISLATIVE ETHICS (1985); DANIEL MARTIN, THE GUIDE TO THE FOUNDATIONS OF PUBLIC ADMINISTRATION (1989); *Public Administration: Past, Present and Future Paradigms, in* PUBLIC SECTOR MANAGEMENT 247-60 (Marcia Lynn Whicker & Todd W. Arenson eds.,

Finally, many modern commentators on legal ethics suggest that the lawyers in an adversarial system must consider not only their clients' interests,[43] but also the public good. Thus, lawyers act ethically only if they consider both the public good and the good of their clients.

Attractive as the notions of civic humanism are, and attractive as the social institutions built on those notions are, one factor could wreak havoc in this context. Social institutions built on the notion of civic

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1990).

43. For some of the most widely quoted discussions of the adversary system of justice, and some of the discussions that most significantly influenced the present writer, see AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE 56-60 (1974); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 16 (1951); Henry S. Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STAN. L. REV. 349 (1952) (Drinker was one of the first writers systematically to study the field of legal ethics in America.); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060 (1976); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161-62 (1958); John B. Mitchell, *The Ethics of the Criminal Defense Attorney*, 32 STAN. L. REV. 293 (1980); John T. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966); Gerald J. Postema, *Moral Responsibility and Professional Ethic*, 55 N.Y.U. L. REV. 63 (1980); Murray L. Schwartz, *The Zeal of the Civil Advocate*, A. B. FOUND. RES. J. 543 (1983); William H. Simon, *The Ideology of Advocacy*, 1978 WIS. L. REV 29; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. BULL. 1 (1975); James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849 (1983). For additional recent discussions, see R.J. Gerber, *Victory vs. Truth: The Adversary System and its Ethics*, 19 ARIZ. ST. L.J. 3 (1987); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role*, 1986 AM. B. FOUND. RES. J. 613 (1986); Harry I. Subin, *The Criminal Lawyer's Difficult Mission: The "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987). None of these works have any systematic discussions of the adversary system in relation to things other than the work of law and lawyers.

For recent books on legal ethics, see MICHAEL DAVIS & FREDERICK A. ELLISTON, ETHICS AND THE LEGAL PROFESSION (1986) (a book of readings), GEOFFREY C. HAZARD & WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (supp. 1987) (a practitioner's guide), GEOFFREY. C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (2d ed. 1988); C. WOLFRAM, MODERN LEGAL ETHICS (1986). For two interesting reference tools on legal ethics, see FREDERICK A. ELLISTON & JANE VAN SCHAICK, LEGAL ETHICS: AN ANNOTATED BIBLIOGRAPHY AND RESOURCE GUIDE (1984); Erwin Chereminsky, *Pedagogy Without Purpose: An Essay on Professional Responsibility Courses and Case Books*, 1985 AM. B. FOUND. RES. J. 189.

In two recent comprehensive essays, Dean Goodpaster cites much of the rest of the literature on ethics in the adversary system. *See* Gary Goodpaster, *On the Theory of American Adversary Trial*, 78 J. CRIM. LAW & CRIMINOLOGY 118 (1987); Gary Goodpaster, *The Adversary System Advantage and Effective Assistance of Council in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. POLICY 59 (1986).

humanism will only work if human beings *actually are* cooperative and altruistic by nature. However, if human beings *actually are* competitive and self-interested by nature, then such social institutions simply cannot work.

B. Classical Liberalism

As noted earlier, Masters recently demonstrated that the Western philosophic tradition has been dominated for most of the last 2,000 years by people who believe that human beings are, by nature, altruistic and cooperative, in other words by pronouncements of what herein is called civic humanism.[44] Admittedly, ancients like Antiphon the Sophist disagreed.[45] For the most part, however, a consensus on this point existed until the seventeenth century.

The seventeenth century, and the two centuries that followed, brought a major change in attitude. First, Thomas Hobbes shocked Europe in the seventeenth century by insisting that the ancients and Medieval philosophers had been mistaken in their "scientific" views of human nature.[46] According to Hobbes, science demonstrates that human

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44. MASTERS, *supra* note 30.

45. *See* ROGER D. MASTERS, THE NATURE OF POLITICS 3 (1989). Masters quotes Antiphon the Sophist, as follows:

> Men draw life from the things that are advantageous to them: they incur death from the things that are disadvantageous to them. But the things which are established as advantageous in the view of the law are restraints on nature, whereas the things established by nature as advantageous are free. Therefore, things that cause pain do not, on a right view, benefit nature more than things that cause pleasure; and therefore, again, things which cause suffering would not be more advantageous than things which cause happiness - for things which are really [truly or in truth] advantageous ought not to cause detriment, but gain. . . . Take the case of those who retaliate only after suffering injury, and are never themselves the aggressors; or those who behave well to their parents, though their parents behave badly to them; or those, again, who allow others to prefer charges on oath, and bring no such charges themselves. Of the actions here mentioned one would find many to be inimical to nature. They involve more suffering when less is possible, less pleasure when more is possible and injury when freedom from injury is possible.

Id. at 3-4.

46. For a discussion of Hobbes' work, see FRANK M. COLEMAN, HOBBES AND AMERICA: EXPLORING THE CONSTITUTIONAL FOUNDATION (1977) and MILTON MYERS, THE SOUL OF MODERN ECONOMIC MAN (1983). Myers explores how Hobbes' ideas gradually

beings are intrinsically competitive and self-interested.[47] Second, and more significantly, eighteenth and nineteenth century philosophers created the notion of "classical liberalism," a notion whose underlying tenets are diametrically opposed to the tenets of civic humanism.[48]

Classical liberalism, Lodge notes in his important discussion of professional ethics, rests on five Lockean principles, all five of which differ markedly from those that controlled prior to Locke's time.[49] First, Lodge notes that everything about Lockean liberalism emphasizes individualism. Individual rights, Locke argued, necessarily must take precedence over group rights.[50] Second, Lodge suggests that eighteenth and nineteenth century Lockean liberalism sanctified property rights.[51] Because property rights established a clear demarcation between the individual and the community as a whole, such rights provide strong support for individual rights. Third, whereas Medieval philosophers expected people generally to cooperate with each other, Locke and his followers thought that competition between people would be the norm.[52]

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evolved into Smith's ideas. *See also* MASTERS, *supra* note 30, at 295.

47. The concept of self-interest itself, of course, is not a simple one. Indeed, Schwartz recently put forward three distinct definitions of self-interestedness. The first definition, which is close to the beliefs of Hobbes, describes human beings as always interested only in themselves. The second definition, which, as will be demonstrated below, is close to the views of Adam Smith, describes human beings as selfish in extreme situations but at least capable of altruism. Finally, a third definition, which is close to the views of Rousseau, describes human beings as altruistic by nature but selfish because of corrupting economic and cultural institutions. SCHWARTZ, *supra* note 34, at 49-50.

48. Classical liberalism seems in significant part to have been an attempt by eighteenth and nineteenth century Western philosophers to create a theory that could bring together Hobbes' "scientific" observation about the underlying self-interestedness of human beings and the idea of democracy. Classical liberalism postulated, in short, that self-interested human beings could in fact live together without the need for an all-powerful ruler or state.

The modern term "liberalism," of course, has a completely different meaning than the term classical liberalism. Indeed classical liberalism is probably more closely aligned with what now would be called "conservatism" than with what now is called liberalism.

49. George Cabot Lodge, *Managerial Implications of Ideological Change*, *in* THE ETHICS OF CORPORATE CONDUCT, 79-105 (Clarence C. Walton ed., 1977).

50. *Id.* at 85.

51. *Id.*

52. *Id.* Antonio Jorge develops this point further in a book written for business educators. ANTONIO JORGE, COMPETITION, COOPERATION, EFFICIENCY AND SOCIAL ORGANIZATION: AN INTRODUCTION TO POLITICAL ECONOMICS (1978). "Competition and cooperation," he argues, "constitute antithetical approaches to human institutions." *Id.* at 13. More significantly, Jorge, reflecting Lockean principles, suggests that these two ideas represent the "most basic general categories of motivation that are found in social life." *Id.*

Social, political and economic structures are all ultimately characterized

> by a specific vision of the kind of relationship that exists or ideally should exist among the human agents that actuate them. . . . Competitive and cooperative motivations transcend or transform formal organization structures, regardless of how they came about historically. At the end, human motivations emerge, albeit gradually and laboriously, as the shaping force of history and social life.

Id. at 15. Jorge returns to this same theme later in his book and makes an even more startling point.

> It is unquestionable that the basic philosophical and ethiocultural heritage of the West is built on and around the individual. The relevant unit of value, thought and action has always, in the Western context, been the individual person. This typically Western mental approach to man and society permeates and invariably influences all aspects of life and culture in Occidental nations. . . . It would seem that such foundations are indestructible, short of the cultural annihilation of the Western type of human being and the basic traits of Western mentality.

Id. at 66-67. Jorge and Lodge are not the only writers on business ethics topics that have discussed these two competing ideas. *See, e.g.*, SAMUEL M. NATALE, ETHICS AND MORALS IN BUSINESS 39-49 (1983). Natale discusses much of the literature on competition and cooperation. *Id.* at 44-50. *See also* MARSHALL MISSNER, ETHICS OF THE BUSINESS SYSTEM 69-139 (1980) (a group of essays on competition and cooperation). For an interesting pair of essays taking conflicting points of view on the issues of cooperation and competition, see both FRANK KNIGHT, ETHICS OF COMPETITION AND OTHER ESSAYS (1935) and Georg Simmel, *The Socializing and Civilizing Function of Competition, in* CONFLICT: THE WEB OF GROUP AFFILIATION (1955). Excerpts from both essays are provided in BRAYBROOKE, *supra* note 36, at 27, 43.

Several writers on legal issues have also discussed these two concepts at considerable length. Unfortunately, these writers cite each others' work and certainly do not cite work done by writers on business ethics. For example, shortly before his death, Robert Kutak, the Chair of the American Bar Association Commission on Evaluation of Professional Standards and the driving force behind the American Bar Association's relatively recent "Model Rules of Professional Responsibility," argued that the adversarial system of justice rests fundamentally upon certain underlying perceptions about human nature. Kutak, *supra* note 25, at 172-87. "The basic premise of virtually all [our] institutions is that open and relatively unrestrained competition among individuals produces the maximum collective good. That idea permeates all aspects of American life, and accordingly, is given effect by law governing the conduct of individuals and the state." *Id.* at 173-74.

Another example of a discussion of the ideas of competition and cooperation can be found in Gerald R. Williams' widely read book, *Legal Negotiation and Settlement*, where Williams suggests that empirical evidence demonstrates that two completely distinct styles of negotiating exist. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983). One of those styles, according to Williams, is competitive; the other style is cooperative. Successful competitive negotiators, Williams argues, have goals that differ significantly from the goals of cooperative negotiators. *Id.* at 23. Competitive negotiators seek to maximize settlement for the client. *Id.* Furthermore, they try to obtain a profitable fee for themselves. *Id.* Finally, they attempt to outdo or out-maneuver the opponent. *Id.* Conversely, successful cooperative negotiators have completely different goals. *Id.* at 20. Although these

The fourth and fifth Lockean principles that serve as the foundation for classical liberalism break sharply from the ideas of Hobbes and, in a dramatic way, prefigure the ideas of Adam Smith.[53] Locke argued for a government with dramatically limited power. (Hobbes, it should be recalled, argued that a sovereign with unlimited powers was necessary.) Locke thought limitations on the power of governments were necessary because powerful states inevitably curtail individual rights.[54] Finally, Locke and his followers argued that specialization and fragmentation should be encouraged.[55] In Locke's view, specialization and fragmentation foster individualism. In addition, specialization and fragmentation reflect the fact that different people do not always share beliefs and goals.[56]

Adam Smith dramatically expanded the scope of Locke's ideas, and thus the notion of classical liberalism.[57] Like Hobbes, Smith

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negotiators seek to maximize settlement for the client and otherwise meet the client's needs, these negotiators also wish to conduct themselves ethically. *Id.* Furthermore, they seek to get what they call a "fair" settlement, a settlement that does not necessarily make them a winner and the other side a loser. *Id.* Finally, cooperative negotiators seek to maintain or establish a good personal relationship with their opponent. *Id.*

After reviewing all of his data, Williams concluded that competitive and cooperative styles of negotiation can be equally effective. *Id.* at 25. Skilled competitive negotiators, he suggests, are just as likely to obtain favorable results for their clients as skilled cooperative negotiators, and vice versa. *Id.* Furthermore, unskilled cooperative negotiators are just as likely to obtain unfavorable results for their clients as unskilled competitive negotiators. *Id.* at 35. In short, according to Williams, neither style of negotiation should be favored. *Id.* at 41.

53. Lodge, *supra* note 49, at 85.

54. *Id.*

55. *Id.*

56. Clarence Walton, in his book *The Ethics of Corporate Conduct*, put Locke's ideas into graphic form. *See* Clarence Walton, *Overview, in* THE ETHICS OF CORPORATE CONDUCT (Clarence Walton, ed. 1977). Walton contrasts what he calls the "classical world view" with what he calls the "modern world view." (The classical world, in this terminology, was that of the middle ages; the modern world was that of the eighteenth and nineteenth centuries.) He then proposed that an admittedly over-simplified chart can in a brief picture capture the essence of most of the changes that occurred between Medieval times and the eighteenth and nineteenth century period of classic liberalism.

57. *See* BEAUCHAMP & BOWIE, *supra* note 41, at 20-21; BEHRMAN, *supra* note 41, at 1-10; BRAYBROOKE, *supra* note 36; ALLEN E. BUCHANAN, ETHICS, EFFICIENCY AND THE MARKET (1985); THOMAS DONALDSON & PATRICIA WERHANE, ETHICAL ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH (1983); DAVID B. RAPHAEL, ADAM SMITH (1985). For a discussion of the relationship of business ethics to larger social issues, see NATALE, *supra* note 52. *See* OSTRUM, *supra* note 42. This discussion also draws on several discussions of classic liberalism. *See* GOTTFRIED DIETZE, LIBERALISM PROPER AND PROPER LIBERALISM 96-103 (1985); ROBERT A. NISBET, THE MAKING OF MODERN SOCIETY 95-108 (1986); ROBERT A. NISBET, SOCIAL CHANGE AND HISTORY 126-28, 142, 150-54, 186-88

believed that human beings are, by nature, essentially competitive and self-interested.[58] Further, Smith believed that nothing can change these "scientific" facts.[59] Conflict between human beings, therefore, is inevitable, at least in heterogenous societies. Building on these perceptions of scientific facts, Smith argued that social institutions should assume that people will act in self-interested and competitive ways.[60] Competition and self-interest, Smith thought, are not necessarily bad things in human beings.[61] In fact, they may well be good things. If the self-interest of one individual or group is juxtaposed with the self-interest of another individual or group, then the respective self-interests of these individuals or groups check or balance each other.[62] If this occurs, a society need not be ruled by an all powerful sovereign. Rather, individual people control each other.

Two final aspects of Smith's thinking must also be mentioned.[63]

(1969). For analysis of these issues from wildly different perspectives, see JOHN KENNETH GALBRAITH, ECONOMICS IN PERSPECTIVE (1987); F.A. HAYEK, STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS (1967); F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960); ROBERT L. HEILBRONER & LESTER C. THUROW, ECONOMICS EXPLAINED (1987); HEILBRONER, *supra* note 36; ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS (1977); Irvin Kristol, *The Capitalist Conception of Justice, in* BUSINESS ETHICS: READINGS AND CASES IN CORPORATE MORALITY 44-51 (W. Michael Hoffman & Jennifer Mills Moore eds., 1984); Joseph A. Pichler, *Capitalism in America: Moral Issues and Public Policy, in* ETHICS, FREE ENTERPRISE AND PUBLIC POLICY 19-40 (Richard T. De George & Joseph A. Pichner eds., 1978); SCHUMPETER, *supra* note 36.

58. To be sure, Smith believed that human beings are capable of altruistic acts, and indeed engage in such acts frequently. However, Smith believed that people cannot be counted on to engage in altruistic acts. HIRSCHMAN, *supra* note 57, at 64-65.

59. Jack Hirshleifer, writing in 1959, put the point most bluntly. "[P]eople other than saints," he noted, "simply are more interested in their own health, comfort, and safety than in other people's and will continue to be until the establishment of the Kingdom of God on earth." Jack Hirshleifer, *Capitalist Ethics, Tough or Soft?*, J. L. ECON. 114, 117-18 (1959). Then he made the crucial point. "All actual social systems, though not all social philosophies, must recognize and cope with that fact." *Id.* at 118.

60. HEILBRONER & THUROW, *supra* note 57, at 27.

61. *Id.* at 29.

62. *Id.*

63. *See generally* Frank Knight, *The Ethics of Competition, in* DAVID BRAYBROOKE, ETHICS IN THE WORLD OF BUSINESS 28-31 (1983). Note carefully in this context two important limiting points about Smith's ideas. First, Smith addressed his theories to the problems of heterogenous societies where people have profoundly differing interests and desires. In homogenous societies, or in heterogenous societies where shared interests temporarily predominate – societies under attack in a state of war, for example – different people's interests do not conflict. Second, Smith did not in any sense feel that the "invisible hand" of the market place could solve all of a society's problems, or that business was somehow the savior of humanity. In fact, Smith repeatedly denounced the greed and avarice

First, recall that Locke believed that competition rather than cooperation is a defining characteristic of social institutions. However, Smith believed that social institutions should promote a particular kind of competitive behavior rather than competitive behavior generally.[64] Competitions over power or intellect, or ability, Smith believed, produce unnecessary disharmony in a society.[65] Thus, Smith argued that the competitive inclinations of human beings should be, as much as possible, channeled into competitive activities involving reciprocal self-interest.[66] In connection with such activities, which are now generally called "market" activities, people advance their own self-interests by advancing the self-interests of others.[67] In other words, Smith called for institutions that encouraged people to help themselves by helping others. Second, as Hayek has noted, Smith and other classical liberals believed that complex enterprises produce prodigious amounts of information that must be processed if those enterprises are expected to function smoothly.[68] Thus, Hayek continues, classical liberals like Smith thought that if societies use "centralized" information-processing mechanisms, such mechanisms must either be incredibly massive and powerful or simply unable to handle the job.[69] But the existence of massive and powerful centralized institutions is flatly inconsistent with the underlying premises of classical liberalism. Hence, Hayek insists that classical liberalism requires decentralized information processing mechanisms.[70]

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of business people and repeatedly called for shared community responsibilities. *See* HEILBRONER & THUROW, *supra* note 57.

64. *Id.*

65. *Id.*

66. *Id.*

67. HEILBRONER & THUROW, *supra* note 57, at 27. Contrary to popular belief, markets in the economic sense of people and businesses buying and selling goods and services are not as "old as the hills, as ancient as the Bible." *Id.* at 11. Thus they are not, as many think, an eternal element of human nature itself. In fact, just the opposite is true. As two important economic Historians have recently noted, "[m]ost production and distribution took place [prior to the late Middle Ages] by following the dictates of tradition or the orders of a lord. In general, only the small leftovers found their way to the market stalls . . . . Markets were the ornaments of society, tradition and command its iron structure." HEILBRONER & THUROW, *supra* note 57, at 12. Markets for the buying and selling of goods, services, money and land did not exist in any significant way prior to the late sixteenth and seventeenth centuries. *Id.* at 15.

68. F.A. HAYEK, 2 LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE (1976); F.A. HAYEK, STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS (1967); F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

69. HEILBRONER & THUROW, *supra* note 57.

70. *Id.*

A full picture of the notion of classical liberalism, a picture that is essentially a mirror image of the picture of civic humanism described earlier, can now be seen. First, proponents of classical liberalism suggest that science itself has established that human beings are, by nature, self-interested and competitive.[71] (Proponents of civic humanism, it should be recalled, insist that science demonstrates that human beings are, by nature, cooperative and altruistic.) Second, proponents of classical liberalism argue that the self-interest and competitive instincts of individual people are good things rather than bad, at least from an overall social perspective.[72] This is so, these people believe, because the use of these instincts in a "check and balance" fashion eliminates the need for all powerful governments. (Civic humanists, of course, seek to root out competition and self- interest). Third, proponents of classical liberalism believe that social institutions should encourage people to engage in competitive activities that involve markets, such as activities that employ reciprocal self-interest.[73] (Again, civic humanists have no interest in these things.) Finally, classical liberalism requires information processing to be done in a decentralized manner.[74] (Civic humanists, it should be recalled, do not have problems with centralized power.)

Notions of classical liberalism serve as the foundation for two major social systems in Western society -- the systems of laissez-faire economics and political pluralism. Laissez-faire economic systems are premised on the assumption that people are, *by nature*, essentially competitive and self-interested.[75] Further, such economic systems use the self-interest and competitive instincts of individual people and groups as checks on the self-interest and competitive instincts of other individuals and groups. In addition, proponents of laissez-faire economic systems attempt to channel people into competitive activities involving markets that involve reciprocal self-interests. Finally, laissez-faire economic systems attempt to decentralize information processing power as widely as possible.

Similar things can be said about systems of political pluralism.

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71. To be sure, proponents of classical liberalism acknowledge that people are capable of altruistic acts. Everyday observation proves that. However, proponents of this notion believe that people cannot be *counted on* to engage in altruistic and cooperative acts.

72. HEILBRONER & THUROW, *supra* note 57.

73. *Id.*

74. *Id.*

75. Admittedly, proponents of laissez-faire economic systems acknowledge that human beings are capable of altruistic and cooperative behavior. However, these proponents believe that human beings cannot be counted on to act in ways other than self-interested and competitive.

Historians and political theorists now know that James Madison and Alexander Hamilton,[76] perhaps the two most important drafters of the United States Constitution of 1787,[77] shared many beliefs with Locke and Smith.[78] Most significantly, these two Americans shared with their predecessors a sense of uneasiness about the ability of human beings generally to transcend personal self-interest.[79] Further, Madison and

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76. MCDONALD, *supra* note 31, at 292-93. Much of the following discussion is also drawn from several important recent books on the American constitution. *See* JOHN P. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF INTEREST AND THE FOUNDATIONS OF LIBERALISM (1984); VINCENT OSTRUM, THE POLITICAL THEORY OF A COMPOUND REPUBLIC (2d ed. 1987); GARY WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981); *see also* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 190-200 (1980); THOMAS A. SPRAGENS, THE IRONY OF LIBERAL REASON 87-90, 297-301 (1981); Herbert J. Storing, *What the Anti-Federalists Were For, in* 1 THE COMPLETE ANTI-FEDERALIST 73-76 (1981); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE CONSTITUTION 3-17 (1942); Jeffrey D. Wallin, *John Locke and the American Founding, in* NATURAL RIGHT AND POLITICAL RIGHT 143-68 (Thomas B. Silver & Peter W. Schramm eds., 1984); Frank I. Michelman, *Traces of Self Government*, 100 HARV. L. REV. 4, 21, 49, 58-60 (1986); Warren J. Samuels, *The Political Economy of Adam Smith*, 87 ETHICS 189 (1977); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Cass R. Sunnstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); Cass R. Sunnstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

77. It must be noted immediately that Thomas Jefferson, John and Samuel Adams, and Patrick Henry did not attend the convention. Had they done so, history might have turned out very differently. These men rejected the Hobbes/Smith view of the venality of human nature and subscribed to a view more consistent with the philosophy of Rousseau, a philosophy arguing that societal institutions corrupted human beings. MCDONALD, *supra* note 31, at 158-59, 186-87.

78. Compare, for example, Smith's comments about rulers themselves with Hamilton's and Madison's views. As McDonald has noted, Smith believed that two kinds of political leaders emerge in times of crisis. MCDONALD, *supra* note 31, at 292-93. One kind holds out some plausible plan of reformation, a plan that this kind of leader pretends will not only remove the inconveniences and relieve the distresses immediately complained of but will also prevent such problems from ever arising again. This kind of leader imagines that different members of a great society can be arranged just as simply as the hand arranges different pieces upon a chessboard. The other kind of leader, Smith argued, acts with temper and moderation, respecting the established power and privileges of individuals. More importantly, this other kind of leader accommodates public arrangements with the "confirmed habits and prejudices of the people." *Id.*

79. "Has it not . . . invariably been found that momentary passions, and immediate interests, have a more active and imperious control over human conduct than general or remote considerations of policy, utility or justice?" THE FEDERALIST NO. 6 (Alexander Hamilton); *see also* OSTRUM, *supra* note 42, at 53. Madison used a vivid and now justly famous metaphor to make the same point: "If men were angels no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." THE FEDERALIST NO. 51 (James Madison). Madison precisely defined the problem as he and Hamilton saw it: "In framing a government which is

Hamilton believed that competition will inevitably exist in human societies, at least in heterogenous societies. Believing as they did in the inevitability of conflict and in the inability of people generally to rise above self-interest, Madison and Hamilton argued that political institutions should closely resemble the economic institutions that Smith had described.[80] Political institutions, Hamilton and Madison thought, should take advantage of the competitive and self-interested nature of human beings rather than simply decry those things. Thus, political institutions should create mechanisms whereby individual people or groups checked each other.[81] Further, Madison and Hamilton believed that political institutions should attempt to channel competitive instincts into market-like activities.[82] Political figures and groups, these men argued, should advance their own interests principally by advancing the interests of others. Finally, Madison and Hamilton apparently concluded that complex societies should disburse information processing and decision making power as widely as possible.[83]

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to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." MCDONALD, *supra* note 31, at 205. To be sure, both Madison and Hamilton thought that human beings were capable of altruistic and cooperative acts, as well as engaging in what were then called "republican" virtues. However, Madison and Hamilton believed that human beings could not be counted on to engage in such acts. For extended comments about links between the political views of the American founders and the economic views of Adam Smith, see Hirshleifer, *supra* note 59, at 117-18.

80. Hirshleifer, *supra* note 59.

81. *Id.*

82. *Id.*

83. The Constitution that Hamilton and Madison helped draft in 1787 and the system of political pluralism that has evolved from use of that Constitution, rests squarely on notions of classical liberalism. This Constitution and the system of political pluralism disbursed political power widely, institutionalized conflict between various centers of power, contained extensive reciprocal self-interest characteristics, and decentralized information and decision making. For example, the drafters split political power between the states and the federal government and between the various branches of the federal government. The drafters also infused that document with market characteristics. For example, democracy itself is a market idea. To advance their own self-interests, such as getting elected, political figures in democracies must cater to the interests of others, namely, the voters. Furthermore, market characteristics play a major role in American governmental institutions. For example, except in unusual situations, the legislative branch in the American system cannot do what it wants to do unless it can get the executive and the judicial branches to agree, and vice versa. To get such agreement, these respective branches must cater to the interests of each other. Even the sub-branches of the legislature must cater to each other's interests. Both houses must approve all legislation.

The American political system also disburses information processing and decision making powers quite broadly. Local government officials process some information and make some decisions, as do regional officials and state officials. National officials of many

IV. THE ADVERSARY SYSTEM IN CONTEXT

Clearly, a direct link exists between the adversary system of justice and classical liberalism. As noted earlier, the adversary system of justice came into full fledged existence in the eighteenth and nineteenth centuries. It replaced a system of dispute resolution that had included many elements of what today would be called mediation and alternative dispute resolution. At about the same time, Locke, Smith, and others created the notions of classical liberalism. The timing is not coincidental. The adversary system of justice, like laissez-faire economics and political pluralism, rests upon the belief that human beings, though capable of altruistic and cooperative acts, are basically motivated by self-interest and competitive instincts. Thus, the adversary system of justice does not expect people to tell the truth on the witness stand or to reveal things that hurt their positions. Rather, the adversary system sets up a "checking" system. One side's lies and concealment check the other side's lies and concealment.[84] Further, the adversary system of justice, like laissez-faire economic systems and pluralistic political systems, steers competition into market-like activities. This is done, of course, by requiring lawyers and litigants in adversary proceedings to advance their own interests principally by catering to the interests of others, namely judges and jurors.[85] In

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different types, also process such information. In other words, in the American political system, countless different political institutions exist to process prodigious amounts of political information.

84. Sisella Bok briefly mentions the adversary system of justice and insists that lying in that system is not justified. Unfortunately, Bok makes no reference to anything remotely resembling the ideas discussed herein. SISELLA BOK, LYING 159-64 (1978). However, Professor Missner makes an interesting point in this context. He states that falsehoods cease to be falsehoods when it is understood on all sides that the truth is not expected to be spoken. It is well known, he continues, that a lawyer's job is to win for the client and not to tell the truth. Thus, falsehoods committed by lawyers are not falsehoods. MISSNER, *supra* note 52, at 87.

85. This last point highlights a crucially important aspect of the adversary system of justice. Although adversary legal proceedings are frequently compared to sporting contests, this analogy is actually quite misleading. To be sure, a sporting contest and adversary litigation both assume self-interested actors. A sporting contest and adversary litigation encourage competition. However, sporting contests for the most part involve fixed rules for determining winners and losers, superior and inferior performances. Whoever runs the fastest, for example, or scores the most points, or lifts the heaviest weight, wins. The competition incident to adversary litigation, however, is very different. It involves reciprocal self-interest. In this kind of competition, competitors who win are competitors who best cater to the interests of others. Thus, the only kinds of sporting contests that could appropriately be compared to adversary litigation are kinds of contests in which judgments are made subjectively by a panel of judges -- figure skating contests, perhaps, or diving contests. Only in these kinds of sporting events do athletes prevail principally by catering to

addition, the adversary system of justice seems to rest in part on the observation that the vast amounts of information that come together in any kind of complicated dispute simply cannot be processed by a single individual. Thus, the adversary system of justice, like all systems that rest on the notions of classical liberalism, distributes information-processing responsibility as widely as possible.

One final link must be noted between classical liberalism and the adversary system of justice. The adversary system, like the systems of laissez-faire economics and political pluralism, seeks to disburse power as widely as possible.[86] As Blackstone wrote during the eighteenth century, "[I]t is not to be expected from human nature, that the few should always be attentive to the interests and good of the many."[87] "[W]hen entrusted to any single magistrate," Blackstone continued, "partiality and injustice have an ample field to range in."[88] These words, of course, could just as easily have been written by Adam Smith or James Madison.

Because direct links exist between the adversary system of justice and classical liberalism, direct links should also exist between "alternatives" to the adversary system of justice and civic humanism. As noted earlier, "pre-adversarial" dispute resolution procedures in Europe contained large amounts of what would now be called mediation. Mediation is a core idea in civic humanism. Even stronger evidence of this link can be found in modern developments.

Many commentators have suggested in recent years that the adversary system is in "decline" or in some kind of "twilight" stage.[89]

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the interests of others.

86. For an interesting discussion of the theory behind limiting the power of judges, see SHELDON GOLDMAN & THOMAS P. JAHINGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM 192-99 (1985).

87. 1 BLACKSTONE, COMMENTARIES, 325-26 (1799).

88. *Id.*

89. For two important discussions of this topic, see Kenneth M. Holland, *The Twilight of Adversariness: Trends in Civil Justice, in* THE ANALYSIS OF JUDICIAL REFORM 17-30 (Philip Du Bois ed. 1982) and Resnik, *supra* note 14, at 494. For other comments about the twilight or breakdown of the adversary system, see BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW 32-34 (1984); Bruce Ackerman, *Four Questions for Legal Theory, in* NOMOS XXII, PROPERTY 351-75 (J. Roland Pennock & John W. Chapman eds., 1980); Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession, in* LAW AND CONTROL IN SOCIETY 222 (Ronald L. Akers & Richard A. Hawkins eds., 1975); MORTON DEUTSCH, DISTRIBUTIVE JUSTICE: A SOCIAL - PSYCHOLOGICAL PERSPECTIVE (1985); HAZARD AND VETTER, *supra* note 26, at 152; LIEBERMAN, *supra* note 24, at 168-71; MURRAY L. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION (2d ed. 1985); Richard B. Stewart, *The Limits of Administrative Law, in* THE COURTS: SEPARATION OF POWERS 75-92 (Bette Goulet ed., 1983); THE GOOD LAWYER, *supra* note 8; WILLIAMS, *supra* note 52; Abel, *supra* note 24, at 287; Jackson B. Battle, *In*

Virtually all of these commentators suggest that the reasons for this decline are exclusive to the profession of law itself. In fact, something else almost certainly provides at least part of the explanation for the modern-day decline of the adversary system.

The systems of laissez-faire economics and political pluralism came under relentless attack in America during the early and middle years of the twentieth century. During the New Deal period, for example, and afterward, the government constantly interfered with market forces in connection with economic issues. The very visible hand of the government at this time gradually came to replace the invisible hand of the market.[90] In short, in the field of economics, acceptance of the tenets of

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Search of the Adversary System: The Cooperative Practices of Private Criminal Defense Attorneys, 50 TEX. L. REV. 60 (1971); Abram Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Richard Danzig & Michael J. Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felsteiner*, 9 L. & SOC'Y REV. 675 (1975); William L. F. Felsteiner, *Influences of Social Organization on Dispute Processing*, 9 L. & SOC'Y REV. 63 (1974); Fiss, *supra* 26, at 1077; Fiss, *supra* note 25, at 121; Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 43 (1979); Fuller & Randall, *supra* note 1, at 1160-61; Galanter, *supra* note 24, at 257; Landsman, *Decline of the Adversary System*, *supra* note 14, at 251; Mitchell, *supra* note 1, at 293; Penegar, *supra* note 1, at 307; A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L. J. 921 (1978); David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979); Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RES. 52 (1967).

90. George C. Lodge, *The Large Corporation and the New American Ideology*, *in* CORPORATIONS AND THE COMMON GOOD 61-77 (Robert Dickie & Leroy S. Rouner eds., 1980). According to Lodge, virtually all political and economic actions that took place during the New Deal era either categorically refuted or significantly limited every single one of the five key Lockean principles of the competitive model. The five Lockean principles were individualism, property rights, competition, limited state, and specialization. The modern welfare state, of course, rejects individualism as the sole guiding light, substituting for such individualism the idea that community rights must frequently take precedence over individual rights. Furthermore, though the modern welfare state has by no means eliminated individual property rights, it has significantly limited them and though it has by no means eliminated competition as a driving force in society it has strongly urged cooperative behavior. Finally, the modern welfare state has replaced the idea of a weak state, and the concomitant idea of specialization and fragmentation, with the idea of a strong central state.

A number of writers about business ethics other than Lodge have made similar observations. For example, Charles Powers and David Vogel noted several years ago in their book, *Ethics in the Education of Business Managers*, that the eighteenth and nineteenth century ideas of individualism and competition gradually gave way during the twentieth century to ideas about community and cooperation for several reasons. *See* CHARLES POWERS & DAVID VOGEL, ETHICS IN THE EDUCATION OF BUSINESS MANAGERS (1986). Powers and Vogel note, for example, that by the early twentieth century, business institutions had grown enormously. Concomitantly, people increasingly had the sense during these early days of the century that those huge businesses were not operating in such a way as to generate overall public good. *Id.* The Crash of 1929, of course, brought concrete reality to

classical liberalism was gradually supplanted, during and after the New Deal era, by acceptance of the tenets of civic humanism. The same thing occurred in the field of politics. Political power became increasingly concentrated. Further, administrative agencies, which combine the powers of the legislative, executive, and judicial branches of government came into prominence during this time.[91] Classical liberalism was losing out to civic humanism.

Not surprisingly, similar developments occurred simultaneously in connection with dispute resolution procedures in the field of law.[92] The adversary system of justice came under relentless attack during the New Deal period. For example, reformers in the American legal system assisted in the writing and adoption the Federal Rules of Civil Procedure.[93] Although many of these new federal rules simply codified existing dispute resolution practice or modified existing rules in minor ways, some of these rules broke new ground.

The most innovative of the new procedural rules involved discovery.[94] The pre-discovery system was perfectly consistent with the underlying tenets of classical liberalism. Lawyers who worked in a pre-discovery system simply assumed that individuals would not act against their own self-interests. Thus, these lawyers expected surprises, tricks, and concealments. However, pre-discovery lawyers also believed that the check and balance process of adversarial proceedings themselves would ultimately sort things out for the best. Furthermore, prior to the enactment of the rules of discovery, judges themselves played very minor roles in litigation prior to commencement of trials.

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this previously abstract thought. Mindful of the problems just noted, Powers and Vogel note that the New Deal era brought forth tremendous legal restraints on business activities. Thus, the "invisible hand" of Adam Smith gave way to the very visible hand of Roosevelt. Furthermore, John Maynard Keynes' ideas about a "mixed" economy, that is, an economy in which competitive and market forces did not function entirely on their own, gained almost complete acceptance.

91. An excellent discussion of the history of administrative law in the United States is provided by Stewart, *supra* note 89, at 75-92. For a discussion of how adversarial proceedings are widely used in administrative agencies, see Adam Yamolinsky, *Responsible Law Making in a Technologically Specialized Society, in* AMERICAN ASSEMBLY, LAW IN A CHANGING SOCIETY 105-07 (Geoffrey C. Hazard ed., 1968).

92. Yamolinsky, *supra* note 91.

93. In a recent paper, Judith Resnik described the process used, and the philosophic ideas controlling, the drafting of the Federal Rules of Civil Procedure. Resnik, *supra* note 14. Resnik argues, quoting original sources and much commentary, that the drafters of these rules simply tried to bolster the efficiency of the adversary system itself. It was not until much later, she suggests, that the adversary system itself began to fall apart. Indeed, she suggests that the 1960s and 1970s saw the first real breakdown in that system. *Id.*

94. *Id.*

The rules of discovery tried to change all of this.[95] Discovery rules are an attempt to make lawyers and clients act against their own self-interests. Further, although there are sanctions for violation of discovery rules, the rules of discovery themselves place the principal onus for compliance on individual lawyers themselves. Finally, rules of discovery concentrate power in the hands of judges. Pre-trial rulings that judges make on discovery issues are often the single most important rulings of an entire piece of litigation.[96] In addition, judges regularly use the rules of discovery to seize control over the litigation itself, stripping that control from the respective lawyers.

The enactment of rules of discovery is not the only legal evidence of the increasing rejection of classical liberalism and the increasing acceptance of civic humanism. The New Deal and post-New Deal periods also saw increasingly widespread use of adjudication procedures in connection with juvenile crimes and in connection with civil commitment proceedings. Both have adopted adjudication procedures that are more "cooperative" than "competitive."[97] In addition, the middle and later

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95. For a discussion of the tension between the rules of discovery and the adversary system of justice, see Shapiro, *supra* note 89, at 1090.

> Is it realistic to expect litigants to treat the discovery phase of a case as a collaborative, disinterested search for the truth of the matter while the trial remains an arena for self-interested, competitive behavior? If discovery standards clearly oblige adversaries to disclose damaging information, what consideration would induce self-interested competitive adversaries to comply with these obligations?

HAZARD & VETTER, *supra* note 26, at 152. For a discussion of the "adversarial" nature of present day discovery, see Wayne D. Brazil, *The Adversary Character of Civil Discovery*, 31 VAND. L. REV. 1295 (1978).

96. Shapiro, *supra* note 89, at 1090.

97. Holland, *supra* note 89. Social scientists have for many years been studying the likelihood, or unlikelihood, that human beings will engage in altruistic, or, to use a more technical term, "pro-social" behavior. *See generally* NANCY EISENBERG, ALTRUISTIC EMOTION, COGNITION AND BEHAVIOR (1986); DEVELOPMENT AND MAINTENANCE OF PRO-SOCIAL BEHAVIOR (Erwin Staub et al. eds., 1984); Nancy Eisenberg et al., *The Role of Sympathy and Altruistic Personality Traits in Helping: A Re-Examination*, 57 J. PERSONALITY 41-67 (1989); *see also* C.R. BADCOCK, THE PROBLEM OF ALTRUISM: FREUDIAN AND DARWINIAN SOLUTIONS (1986); KENNETH E. BOULDING, THE ECONOMY OF LOVE AND FEAR 89-101 (1973); DAVID COLLARD, ALTRUISM AND ECONOMY (1978); HOWARD MARGOLIS, SELFISHNESS, ALTRUISM AND RATIONALITY: A THEORY OF SOCIAL CHOICE (1982); EDMUND S. PHELPS, ALTRUISM, MORALITY AND ECONOMIC THEORY (1975). At least some of the work done by these social scientists, most notably the work done by Morton Deutsch, has come to the attention of people who have written about the adversary system of justice. DEUTSCH, *supra* note 89. Reflecting on the bombings of Hiroshima and Nagasaki, Deutsch observed in the late 1940s that nations could either

years of the twentieth century saw more and more every-day civil and criminal cases terminated well before true adversarial litigation. Thus, at the present time, most civil proceedings are settled well before an actual trial begins.[98] The same thing is now true of most criminal matters.[99] It is clear, therefore, that in these contexts adversarial justice is the exception rather than the norm. The core idea in the adversary system, namely competition, is lost. In addition, the twentieth century has witnessed a tremendous increase in the use of "alternative" dispute

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cooperatively work together to solve their joint problems or competitively work against each other for relative advantage. Deutsch then set out to see whether cooperation or competition worked better in terms of dispute resolution. Deutsch's research ultimately demonstrated two things. First, relatively few conflicts actually are intrinsically and inevitably win-lose conflicts. *Id.* at 72. Rather, common ground almost always exists between contesting parties. Compromise solutions, therefore, can almost always be found. Second, Deutsch's research showed that cooperative groups on the whole function better than competitive groups when it comes to dispute resolution. *Id.* at 67.

98. Holland, *supra* note 89.

99. On this point, which will be returned to later in this paper, see generally Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984). Schulhofer takes on much of the current legal ethics establishment by arguing that plea bargaining in criminal cases was neither inevitable nor necessarily a good thing. Plea bargaining, Schulhofer acknowledges, seems to be consistent with the work of many organizational analysts, work which suggests that people usually wish to reduce uncertainty or conflict. However, Schulhofer continues, reduction of uncertainty and conflict in criminal proceedings, such as the institutionalization of plea bargaining, can produce great unfairness. Empirical studies show, Schulhofer argues, that reductions in uncertainly and conflict in criminal proceedings essentially force most criminal defendants to plead guilty, at least to lesser offenses. But, he argues, empirical studies also show that at least some defendants forced to plead guilty in these circumstances in fact had meritorious defenses to the charges brought against them, defenses that might well have gained them acquittal had they actually gone to trial.

The problem in criminal proceedings is not, Schulhofer concludes, a problem with the underlying model of the adversary system of justice. That model, Schulhofer suggests, is an extremely good one. Cooperation is not better in criminal proceedings than competition. Rather, the problem in criminal proceedings simply is one of time and numbers. Can huge numbers of criminal defendants be given adversary proceedings without creating massive delays? Schulhofer, relying on data generated in an experiment in the Philadelphia criminal courts, unequivocally says yes.

Schulhofer's data, of course, when contrasted with Deutsch's, brings this discussion back to its primary question. Can science itself, either biological science or social science, provide any help in deciding whether human dispute resolution procedures should rest upon the competitive model or the cooperative model, or upon some combination of the two? The answer to that question should now be clear. Science itself cannot at the present time add anything of value to discussions about the value, or lack thereof, of the adversary system of justice itself. Or, better said, science cannot add anything of value to discussions in this context, except in the crucial area of gender.

resolution procedures such as arbitration and mediation.[100]

These things are not the only evidence of twentieth century disenchantment with the adversarial proceedings and, consequently, twentieth century disenchantment with the overall notion of classical liberalism. The post-New Deal era brought an increasing tendency of judges to question witnesses themselves, or even to call special witnesses.[101] Further, this era brought an increasing tendency by some judges to balance the respective skills of the opposing lawyers.[102] Both of these things, of course, fly directly in the face of traditional conceptions of the adversarial process. However, both of them align perfectly with the tenets of civic humanism.

One additional example of the increasing dissatisfaction of twentieth century American lawyers with the notions of classical liberalism and the concomitant increasing satisfaction with the notions of civic humanism must be mentioned. For almost twenty years, Chayes has been arguing that an entirely new form of litigation has been developing in the courts of the United States. Chayes calls this new form of litigation "Public Law Litigation."[103] Public law litigation, Chayes insists, differs dramatically from traditional adversarial proceedings. Frequently, for example, courts involved with this kind of litigation join additional litigants, often against the will of the initial litigating parties. This procedure flies squarely in the face of a crucial aspect of traditional adversarial proceedings. In adversarial proceedings, the parties themselves decide who will be joined in the suit, and who will not be joined. In addition, "class actions" frequently occur. In these actions, litigants seek to determine the rights of whole communities of people. Traditional actions for the most part simply adjudicate the rights of individuals. Further, and again contrary to what occurs in traditional adversarial

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100. The most significant example of the American legal systems' "failing faith" in adversarial justice, Resnik argues, is the movement toward Alternative Dispute Resolution (ADR). For recent discussions of ADR, most of which make similar points, see *The Emergence of the Judge as a Mediator in Civil Cases,* 69 JUDICATURE 257 (1986). *See also* LEO L. KANOWITZ, ALTERNATIVE DISPUTE RESOLUTION (1986); Danzig & Lowy, *supra* note 89, at 675; Owen M. Fiss, *Out of Eden,* 94 YALE L. J. 1669 (1985); Skolnick, *supra* note 89.

101. Holland, *supra* note 89.

102. Resnik says this is another example of the legal professions "failing faith" in adversarial proceedings. Resnik, *supra* note 14.

103. *See* Chayes, *supra* note 26. Professor Chayes hints at a connection between changes in the adversary system and changes in society as a whole. *Id.* at 1285-86. *See also* Chayes, *supra* note 89. For a discussion of similar notions, see Arthur S. Miller & Jerome A. Barron, *The Supreme Court, The Adversary System and the Flow of Information to the Justices: A Preliminary Inquiry,* 61 VA. L. REV. 1187 (1975).

proceedings, judges in public law litigation frequently play a very active role.

It should now be clear that the dispute resolution procedures used in connection with the public law litigation that Chayes describes are much more consistent with the tenets of civic humanism than with the tenets of classical liberalism. Whereas proponents of classical liberalism believe that human beings are, by nature, self-interested and competitive, proponents of civic humanism believe that human beings are, by nature, cooperative and altruistic. Successful resolution of public law litigation, it seems, requires cooperation and altruism. Further, proponents of classical liberalism insist that self-interested behavior by individuals is actually a good thing rather than a bad thing. Self-interested actions, these people believe, at least when checked by self-interested actions of others, actually increase the overall store of human good. Civic humanists and Chayes disagree.[104] In addition, proponents of classical liberalism believe that social institutions, including dispute resolution institutions, should encourage people to engage in competitive activities that involve markets. Again civic humanists and Chayes, seem to disagree. Finally, advocates of classical liberalism insist that power, and information processing, should be disbursed as widely as possible. Obviously, this is not something with which proponents of public law litigation, nor proponents generally of civic humanism, agree.

V. THE "NATURE" OF DISPUTE RESOLUTION

It should now be clear that two distinct conceptions of judicial dispute resolution exist. One of these, the traditional "adversary" system, rests on the notion that human beings are, *by nature*, self-interested and competitive. The other, the modern alternative dispute resolution system, rests on the notion that human beings are, *by nature*, cooperative and altruistic. Ironically, these facts reveal that the fundamental dispute at issue here is not an issue regarding competing philosophies. Rather, the real dispute here is about scientific evidence, which exists in the fields of biology and sociology. What exactly is the *nature* of human beings?

A. Biology and Dispute Resolution

Very near the beginning of his important recent book, *The Nature of Politics*, Roger Masters notes that in recent years scientists working in

104. Chayes, *supra* note 26.

the fields of biology, neurophysiology, neurochemistry, experimental psychology, ethology, and ecology have gathered a substantial amount of empirical information about human nature.[105] Masters then notes that these scientific developments create one of the central intellectual paradoxes of the second half of the twentieth century.

> At a time when the traditional concerns of philosophers are more amenable to scientific analysis than at any period since the inception of Western political thought, scientific inquiry and political philosophy have generally been divorced. Humans have, for the first time, the capacity to engage in genetic engineering -- and thus the power to create new forms of human existence -- yet the social sciences remain largely untouched by research in the biological sciences.[106]

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105. MASTERS, *supra* note 30, at xii. The literature of sociobiology and biopolitics is immense. However, much of that literature is discussed in Masters' book. Masters generally looks favorably on attempts to use biological science to examine human social institutions. Another book that also examines much of the literature is Phillip Kitcher, *Vaulting Ambition: Sociobiology and the Quest for Human Nature*. PHILLIP KITCHER, VAULTING AMBITION: SOCIOBIOLOGY AND THE QUEST FOR HUMAN NATURE (1985) [hereinafter VAULTING AMBITION]. Kitcher is extraordinarily critical of most attempts to use scientific knowledge in connection with discussions of human social institutions. An updated version of some of Kitcher's earlier points is Phillip Kitcher, *Imitating Selection, in Evolutionary Processes and Metaphors*. Phillip Kitcher, *Imitating Selection, in* EVOLUTIONARY PROCESSES AND METAPHORS 295-318 (Mae-Wan Ho & Sidney W. Fox eds., 1988). A number of recent works not cited in the huge bibliographies of Masters and Kitcher provided the present writer with important insights. *See* BADCOCK, *supra note* 97; CHARLES CRAWFORD ET AL., SOCIOBIOLOGY AND PSYCHOLOGY: IDEAS, ISSUES AND APPLICATIONS (1987); ROBERT H. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS (1988); JOHN & MARY GRIBBIN, THE ONE PERCENT ADVANTAGE (1988); CHRISTOPHER ROBERT HALLPIKE, THE PRINCIPLES OF SOCIAL EVOLUTION (1986); ROBERT A. HINDE, INDIVIDUALS, RELATIONSHIPS, AND CULTURE: LINKS BETWEEN ETHOLOGY AND THE SOCIAL SCIENCES (1987); AUSTIN L. HUGHES, EVOLUTION AND HUMAN KINSHIP (1988); HOWARD L. KAYE, THE SOCIAL MEANING OF MODERN BIOLOGY: FROM SOCIAL DARWINISM TO SOCIOBIOLOGY (1986); SAMUEL P. OLINER & PEARL M. OLINER, THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE (1988); THE ROLE OF BEHAVIOR IN EVOLUTION (Henry C. Plotkin ed., 1988); Brian A. Gladu, *Evolutionary Controversy and Biopolitics: Separating Issues from Rhetoric: A Commentary on Gans' Essay, "Punctuated Equilibria and Political Science,"* 7 POL. LIFE SCI. 72 (1988); Glenn W. Harrison & Jack Hirshleifer, *An Experimental Evaluation of Weakest Link / Best Shot Models of Public Goods*, 97 J. POL. ECON. 201 (1989); David Marquand, *Preceptoral Politics, Yeoman Democracy and the Enabling State*, 23 GOV'T & OPPOSITION 261 (1988); Alexander Rosenberg, *Grievous Faults in Vaulting Ambition*, 98 ETHICS 827 (1988).

106. MASTERS, *supra* note 30, at xii.

Austin Hughes expands on that point.[107]

> [S]ociobiology (at its best, at any rate) makes no value judgments regarding good or evil. If sociobiological theory predicts that human behaviors, like those of other animals, are likely to be largely reproductively "selfish," it makes no value judgment as to whether this is a "good" or a "bad" thing. Science is concerned with observation, explanation and prediction of the material world and not with passing judgment on it. The authors of Medieval bestiaries passed judgment on the alleged moral qualities of the animal species they described. We find such an idea ridiculous today, and an ecologist seeking to understand predation does not need to reassure his readers that he is not concerned with condemning or praising the behavior of predators. One day, it is hoped, we will have a fully mature science of human society, and it practitioners will likewise feel no need of explaining that they are unconcerned with praise or blame. When that day comes, the "ethical" criticisms of sociobiology will seem as quaint and ludicrous as the Medieval bestiaries.[108]

Regrettably, the field of legal ethics has been almost wholly untouched by recent research in the biological sciences. Most writers about professional ethics, for example, seem to ignore completely the work of Masters and Hughes. This is so even though the writings of these individuals present scientific data that has already been filtered for use by non-scientists. Further, most writers about professional ethics seem to ignore the extraordinarily important empirical work of Edward Wilson, the founder of the so-called field of "sociobiology." Wilson's work involves, among other things, attempts to determine whether human beings are, by nature, competitive or cooperative, altruistic or self-interested.[109]

Finally, and perhaps most surprisingly, most writers about professional ethics completely ignore the work of historians of science

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107. HUGHES, *supra* note 105, at 134, 135.

108. *Id.* Ironically, Professor Masters, who clearly is the best defender of the field of sociobiology, would probably disagree with these sentiments. Masters argues that the so-called "naturalistic fallacy" -- this fallacy, which Hughes is talking about, supposedly occurs whenever scientific facts are related to decisions about values -- may not be a fallacy at all. Perhaps some values, at least those that underlie certain human social institutions, can in fact be linked directly to scientific facts. MASTERS, *supra* note 30, at 182-83, 227.

109. EDWARD O. WILSON, SOCIOBIOLOGY (1975); EDWARD O. WILSON, ON HUMAN NATURE (1979).

such as Phillip Kitcher.[110] Because Kitcher is the most important debunker of sociobiology itself, he is an important ally of people who wish to keep ethical issues separated from scientific exploration.[111]

Four things probably explain the failure of most writers of professional ethics to discuss biological issues. First, as this Author has recently demonstrated in another context, most members of the different professions are extraordinarily parochial.[112] Thus, most members of professions simply have no interest in ideas from outside of their particular fields. Second, many people who generally work in fields related to the humanities are justifiably nervous about intellectual forays into the hard sciences. The work of hard scientists, these people think, is simply beyond comprehension to non-specialists. Third, as Beitz has noted, the field of sociobiology is filled with "irritating and frequently pretentious literature."[113] Thus, people who write about ethical issues who might initially be quite open to ideas from the hard sciences quickly lose interest in those ideas when they read the actual literature of sociobiology.

The fourth possible explanation, perhaps the most important one, includes an overwhelming amount of anecdotal evidence. This evidence suggests that very large percentages of the teachers in higher education institutions generally, and even larger percentages of such teachers who work in fields related to the humanities, personally adhere to distinctly left-wing political perspectives.[114] The early work of a number of sociobiologists, however, became linked with right-wing political

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110. KITCHER, VAULTING AMBITION *supra* note 105.

111. This is not to say, of course, that all writers in the fields of law, business, journalism and politics completely ignore recent discussions of scientific evidence. A number of writers about legal topics, for example, have discussed some of the literature of biology. *See, e.g.*, JOHN H. BECKSTROM, SOCIOBIOLOGY AND THE LAW: THE BIOLOGY OF ALTRUISM IN THE COURTROOM OF THE FUTURE (1985); LAW, BIOLOGY AND CULTURE: THE EVOLUTION OF LAW (Margaret Gruter & Paul Bohannan eds., 1983); JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE (1985).

112. Paul T. Wangerin, *The Problem of Parochialism in Legal Education*, EDUC. RES. Q. (1993).

113. Charles R. Beitz, Book Review, 93 ETHICS 219, 219 (1982) (reviewing RALPH PETTMAN, BIOPOLITICS AND INTERNATIONAL VALUES: INVESTIGATING LIBERAL NORMS (1981)).

114. For discussions of this topic, see generally Betrand de Jouvenel, *The Treatment of Capitalism by Continental Intellectuals, reprinted in* FRIEDRICH A. VON HAYEK, CAPITALISM AND THE HISTORIANS (1954). *See also* ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1989); SCHUMPETER, *supra* note 36, at 145.

perspectives, most notably with a defense of laissez-faire economics.[115] It is possible, therefore, that at least some writers about professional ethics simply do not wish to write about empirical evidence that perhaps undermines their positions.[116]

There can be no doubt that any discussion of possible links between biological science and professional ethics must begin with reference to the ideas of Charles Darwin.[117] Darwin discovered that all organisms, including human organisms, (1) compete against each other for scarce resources, (2) seek primarily to pass on their genetic characteristics to their offspring, and (3) survive only if fit.[118] At first glance, these discoveries seem to give tremendous scientific support to proponents of classical liberalism. This is so, of course, because classical liberalism rests on the belief that human beings are essentially competitive and self interested. Not surprisingly, therefore, some early writers about ethical issues, most notably Herbert Spencer, quickly concluded that something called "Social Darwinism" explained human social institutions.[119] Further, as already noted, some early writers about sociobiology itself, most notably Edward O. Wilson, too quickly linked biological findings with specific forms of human social institutions.[120]

Similar direct links between biological findings and specific kinds of social systems continue even now. Thus, as one critic of modern sociobiology has noted, the proclaimed reach of this new scientific field is very broad:

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115. *See, e.g.*, WILSON, *supra* note 109; Edward O. Wilson, *Human Decency is Animal*, N. Y. TIMES MAG., Oct. 12, 1975, at 38-50; *see also* Richard A. Epstein, *A Taste of Privacy: Evolution and the Emergence of a Naturalistic Ethic*, 9 J. LEGAL STUD. 665, 672-75 (1980); Jack Hirshleifer, *Privacy: Its Origin, Function, and Future*, 9 J. LEGAL STUD. 649, 649 (1980).

116. Hobson has perhaps put this point best. Early sociobiological ideas, he suggests, became the "*bete noir* of . . . many liberal intellectuals." J. Allan Hobson, M.D., *Psychiatry as Scientific Humanism: A Program Inspired by Roberto Unger's Passion*, 81 NW. U. L. REV. 791 (1987).

117. For an excellent and comprehensive recent discussion of Darwin's work can be found in ROBERT JOHN RICHARDS, DARWIN AND THE EMERGENCE OF EVOLUTIONARY THEORIES OF MIND AND BEHAVIOR (1987).

118. For a discussion of Darwin's ideas, see generally ASHLEY MONTAGUE, DARWIN, COMPETITION AND COOPERATION (1987) and ROBERT M. YOUNG, DARWIN'S METAPHOR NATURE'S PLACE IN VICTORIAN CULTURE (1985).

119. A discussion of Spencer's ideas and their impact in the field of law is Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985). *See also* RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (1954); ROBERT JOHN RICHARDS, DARWIN AND THE EMERGENCE OF EVOLUTIONARY THEORIES OF MIND AND BEHAVIOR (1987); SCHWARTZ, *supra* note 34.

120. EDWARD O. WILSON, SOCIOBIOLOGY (1975).

> The promiscuity of men and the fidelity of women, the extreme devotion of women to child care, the extraordinary selectivity of women relative to men in choice of mate -- all of these characteristics of human social behavior and more can be traced to the action of selfish genes. And so, in the hands of sociobiology, the conception of people as in slavish pursuit of self-interest extends beyond the bounds of the market to virtually all aspects of social life. Furthermore, human selfishness is clearly a reflection of natural law, since it is of a piece with the selfishness of ants, birds, fish, and all other living organisms.[121]

Few modern scientists who study the biological basis of social institutions now subscribe to the grand claims just described. Rather, most scientists involved in this field now make only the most cautious connections. They do this in turn for two reasons. First, as Kitcher has demonstrated, much of the science done by sociobiologists is simply not good science.[122] Observations themselves, Kitcher suggests, were often faulty in early sociobiological research.[123] Further, improper interpretation of collected data often occurred in that early work.[124] Second, as Masters notes, the data that science itself produces in this field is very, very difficult to apply to human social institutions.[125] "Humans -- like other animals -- are highly variable," he notes "and likely to show contradictory traits."[126]

> The first requisite for a rigorously scientific approach to human nature is . . . willingness to abandon the belief that answers are either/or: [o]ur behavior can be both innate and acquired; both selfish and cooperative; both similar to that of other species and uniquely human.[127]

Notwithstanding all of the caveats and limitations just noted, some things probably can now safely be said about links between biological

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121. SCHWARTZ, *supra* note 34, at 315. Schwartz, incidentally, does not agree with the propositions just cited.

122. KITCHER, VAULTING AMBITION, *supra* note 105.

123. *Id.*

124. *Id.*

125. MASTERS, *supra* note 30.

126. *Id.* at 1.

127. *Id.*

discoveries and human behavior and social institutions. A few of those things impact this discussion of four problems in professional ethics.

Perhaps the most important intellectual breakthrough in the entire field of sociobiology occurred in 1964. Prior to that time, scientists who studied the biological basis of human behavior were immensely troubled by an apparent contradiction between Darwin's findings -- survival of the most fit -- and the clear existence in human beings of both the ability and willingness to engage in altruistic behavior. Altruistic behavior, these scientists thought at that time, seems simply to be impossible in light of Darwin's findings. In 1964, however, William Hamilton introduced the idea of "inclusive fitness."[128] Queen bees, he observed, do not mate generally with worker bees.[129] Thus, worker bees do not directly pass on genetic material.[130] Nevertheless, worker bees engage in enormous amounts of work to support the queen.[131] Such conduct, Hamilton initially reasoned, seems flatly to contradict Darwin's theories.[132] Or maybe not. Maybe, Hamilton later concluded, organisms are fit, and thus likely to survive, not only if they pass on their *own* direct genetic material, but perhaps also if their actions increase the likelihood that the genetic material of their *kin* passes on to future generations.[133] Presto: The existence of human altruism in a world of Darwinian fitness is explained.[134] Much altruistic behavior engaged in by human beings, is directed at close relatives. Thus, though altruistic behavior may limit the transmission of a human being's own personal genetic material, such behavior may well increase the likelihood of the transmission of the genetic material of a closely related organism, namely, the person helped.

Once scientists had reconciled the existence of human altruism with notions of Darwinian fitness, those scientists could move on to an analysis of links between biological facts and human social institutions. Masters has led the way in that analysis. Biology, Masters cautiously argues, can be used to demonstrate three things about workable human

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128. William Hamilton, *The Genetical Evolution of Social Behavior*, 7 J. THEORETICAL BIO. 1 (1964).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Hamilton, *supra* note 128, at 1.

134. MASTERS, *supra* note 30, at 155-59; *see also* RICHARD D. ALEXANDER, THE BIOLOGY OF MORAL SYSTEMS (1987); ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION (1984) (discussing the now famous "tit for tat" strategy).

social institutions, but only three things.[135] One of these three, in turn, is critically important in connection with the present analysis. Workable human social institutions, Masters argues, must rest on a recognition of the fact that human beings are simultaneously competitive and cooperative, and simultaneously altruistic and self interested.[136] Thus, Masters suggests, social institutions that rest on the assumption that human beings are solely cooperative and altruistic will not work.[137] Likewise social institutions that rest on the assumption that human beings are solely competitive and self-interested also will not work.[138]

Regrettably, it should now be clear that the work of the sociobiologists generally, and Masters' interpretations of that work specifically, provide little help in connection with an attempt to choose between the two sets of answers to the four ethical questions posed herein. Admittedly, if the statements about the nature of human beings that Masters and the modern biologists make are correct, then the empirical claims about human nature upon which classical liberalism rests -- claims advanced by Hobbes, Smith and the like -- simply are wrong. Likewise, if Masters and the modern biologists are correct, then the empirical claims about human nature upon which civic humanism rests -- claims advanced by Aristotle, Plato, Hegel, Rousseau, Marx, and the like -- also are simply wrong. So, the answers to the four ethical questions that proponents of these two philosophic notions present may well also be wrong. However, Masters and the modern biologists do not themselves offer any real substitute answers.

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135. Although Masters believes that certain generalizations can in fact legitimately be made about the consistence of societal institutions with human biology, he regularly counsels against deprecating social systems that may seem strange or even displeasing. MASTERS, *supra* note 30, at 228-29.

136. *Id.* at 229-33.

137. *Id.* at 240.

138. Masters' other two general conclusions are these: Social systems based on the rule of law are more consistent with the nature of human beings than are systems of totalitarian and autocratic rule. *Id.* at 225-26, 245. Further, democratic political processes associated with republican or constitutional forms of government seem to be naturally right for human beings. *Id.* at 232, 245.

Note carefully in this context a crucial limiting point. Masters is by no means arguing, as Francis Fukayama seems to be arguing in his much discussed recent essay, "The End of History," that human societies themselves have gone, or are going through, some kind of evolutionary process that ultimately will allow only one kind or another of societal institutions to survive. *See* Francis Fukayama, *The End of History, in* THE PUBLIC INTEREST (1989). Rather, Master says that certain kinds of social institutions may well be more consistent with human nature than other kinds of social institutions. Phillip Kitcher, sociobiology's most important critic, also categorically rejects such evolution. Kitcher, *supra* note 105, at 295-318.

B. Social Science and Dispute Resolution

Fortunately, biologists are not the only scientists who have in recent years conducted empirical research regarding the underlying nature of human beings. Social scientists also have attempted to determine whether human beings are, by nature, cooperative and altruistic or, competitive and self-interested.[139]

Morton Deutsch's work is of particular interest in connection with the present analysis.[140] During the late 1940s Deutsch observed that nations or individuals could either work together cooperatively to solve their joint problems or work competitively against each other for relative advantage.[141] Deutsch then attempted to determine which of those two different kinds of dispute resolution procedures worked better, cooperative procedures or competitive ones.[142] These studies ultimately established, Deutsch concluded, that relatively few human conflicts actually are win-lose conflicts.[143] Rather, contesting parties almost always can find common ground and compromise solutions.[144] Another of Deutsch's conclusions, however, is more pertinent to the present analysis. Deutsch claims that individuals and groups that used cooperative dispute resolution procedures generally functioned better than individuals and groups that used competitive dispute resolution procedures.[145] Cooperative dispute resolving groups, Deutsch observed, developed more inter-member communication, more friendliness and helpfulness, and less obstructiveness in discussions.[146] In addition, Deutsch observed that people exposed to cooperative dispute resolution procedures developed more of a feeling of agreement with the ideas of others and a greater sense of basic similarity in beliefs and values than people exposed to non-cooperative dispute

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139. *See generally* DEVELOPMENT AND MAINTENANCE OF PRO-SOCIAL BEHAVIOR, *supra* note 97; NANCY EISENBERG, ALTRUISTIC EMOTION, COGNITION AND BEHAVIOR (1986); Nancy Eisenberg, *The Role of Sympathy and Altruistic Personality Traits in Helping: A Re-Examination*, 57 J. PERSONALITY 41, 41-67 (1989); PHELPS, *supra* note 97; *see also* BADCOCK, *supra* note 97; BOULDING, *supra* note 97; COLLARD, *supra* note 97; MARGOLIS, *supra* note 97.

140. *See generally* MORTON DEUTSCH, DISTRIBUTIVE JUSTICE: A SOCIAL - PSYCHOLOGICAL PERSPECTIVE (1985).

141. *Id.* at 64.

142. *Id.* at 69.

143. *Id.* at 94.

144. *Id.* at 94-95.

145. DEUTSCH, *supra* note 140, at 94.

146. *Id.*

resolution procedures.[147] Further, Deutsch observed that people in cooperative groups were more likely to think of conflicting interests as mutual problems to be solved than were people in other kinds of dispute resolution groups.[148]

Deutsch's research initially seems to provide a good deal of empirical support for the position staked out by proponents of civic humanism. One of the fundamental tenets of that notion, of course, is an emphasis on cooperation among humans. Sadly, however, two things belie that preliminary conclusion. First, although Deutsch's research indeed does suggest that social institutions that encourage cooperative and altruistic behavior *work better* in connection with the resolution of disputes than social institutions that encourage competitive and self-interested behavior, Deutsch's research says nothing whatsoever about the nature of human beings themselves. Human beings, therefore, could be completely self-interested and competitive and yet decide, for reasons of efficiency, to use cooperative dispute resolution procedures. Thus, though Deutsch's research may be useful in connection with questions of efficiency, it is of no use at all in connection with questions of ethics.

Second, careful analysis reveals that the social institutions that Deutsch proposes in light of his research findings could just as easily be built upon the tenets of classical liberalism as upon the tenets of civic humanism. Deutsch argues, for example, that social institutions should encourage people to focus on the interests of people with opposing positions.[149] But, classical liberalism as well as civic humanism says that this should be done. Classical liberalism, after all, calls for competitive instincts to be steered into "markets." And markets, of course, are where people advance their own interests by advancing the interests of others. In addition, Deutsch argues that social institutions should encourage full, open, honest, and mutually respectful communication between conflicting parties.[150] Again, however, classical liberalism, as well as civic humanism, encourages such conduct. Finally, Deutsch argues that social institutions should help people develop a sophisticated awareness of the norms, rules, and procedures that are available to support good faith negotiations and to deter dirty tricks, refusals to negotiate, and exploitation.[151] Here Deutsch actually sounds more like a classical liberal than a civic humanist.

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147. *Id.* at 94.

148. *Id.*

149. *Id.*

150. DEUTSCH, *supra* note 140, at 94.

151. *Id.* at 46-63.

The foregoing reveals that once again the field of science, this time the field of social science, provides little or no help in determining whether human beings are, *by nature*, competitive and self-interested or cooperative and altruistic. Thus, sadly, science itself seems unable to provide assistance when it comes to deciding which of the two competing systems of dispute resolution is more closely aligned with human nature.

VI. CONCLUSION

It would be easy to conclude this analysis by suggesting that non-adversarial dispute resolution procedures will become even more important as the twentieth century draws to a close. That clearly seems to be the trend. Further, it would be easy to suggest that adversarial proceedings as we know them might well be non-existent in the relatively near future. These easy conclusions, however, might well be simply wrong.

This analysis began, it should be recalled, with a rather snide comment about academic writing in the field of law. Academics should perhaps follow Churchill's advice and take a nap, the analysis suggested, rather than write yet another piece on the adversary system of justice. Ironically, this analysis has now in a sense come full circle. It closes with yet another reference to ideas of political leaders, ideas that, like Churchill's, might not be comfortably received by trend-setting academics.

George Bush took great pleasure in announcing during his 1989 visit to Hungary that Marx's *Das Kapital*, the bible, so to speak, of the modern version of civic humanism, is no longer required reading at Budapest's Karl Marx University. Conversely, as one of Bush's national security advisors coyly noted, that book is "still a major item at Stanford."[152] These comments, of course, are consistent with another joke frequently heard in political circles. Socialism's supporters, political wags now often suggest, do not live behind the iron curtain. Rather, they live on American college campuses.

The point of these references is this: Countless academics now call for abolition of the adversary system of justice, a system that rests on the tenets of classical liberalism, and for the triumph of an alternative system of justice, a system that rests on the tenets of civic humanism.[153]

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152. Fred Barnes, *Holland Diarist*, NEW REPUBLIC, Aug. 7 & 14, 1989, at 42.

153. Interestingly, things are not necessarily quite this clear, even to the academic involved. For example, near the end of Stephen Landsman's recent book about the adversary system of justice, Landsman quotes Deborah Rhode, a frequent critic of that same system. Rhode argues in the quoted excerpt that traditional arguments in support of the requirement of lawyer confidentiality remain wholly unconvincing. Even the most fervent defenders of

While these academics do this, however, people throughout the world who have actually lived under political and social systems that rest on the ideas closely related to those of civic humanism seem desperate to throw off those systems and replace them with systems that rest on the principles of classical liberalism.[154]

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unqualified confidentiality, Rhode argues, do not for the most part pursue the logic of their position when their own self interests are at issue. Thus, she notes, few defenders of the requirement of confidentiality object to breaches of confidentiality if such breaches are necessary for lawyers to collect their fees. Rhode then notes that "[i]t is unclear why the pecuniary interests of lawyers should assume priority over the potentially more significant claims of third party victims." Actually, however, it is not at all unclear, at least to Rhode, why lawyers should put their own interests over the interests of others. Lawyers, she says in a quoted passage that ends Landsman's book, "will inevitably resolve doubts in expedient directions." LANDSMAN, READINGS, *supra* note 2.

154. For two fascinating studies of recent changes in the former Soviet Union, both by long established Soviet scholars, see generally JERRY F. HOUGH, RUSSIA AND THE WEST: GORBACHEV AND THE POLITICS OF REFORM (1988) and MICHEL TATU, GORBACHEV: L'URSS VA-T-ELLE CHANGER? (1988).

Not surprisingly, lawyers resolve disputes in socialist societies in ways very different than those used by societies that employ the adversary system of justice. *See generally* Justice Robert F. Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383 (1987); *see also* Donald D. Barry & Harold J. Berman, *The Soviet Legal Profession*, 82 HARV. L. REV. 1 (1968); Christopher C. Osakawe, *The Public Interest and the Role of the Procurator in Soviet Civil Litigation: A Critical Analysis*, 18 TEX. INT'L L.J. 37 (1983). Professors Barry and Berman note, for example, that the idea of "advokatura" was not introduced into Russia until the mid-nineteenth century. They suggest that the revolution should have changed all that.

> There is nothing in Marxist theory or in the spirit of Bolshevism which explains the utility for a socialist society of preserving the office of the professional legal representative, whose task is to present his client's cause in the best possible light and not to pass judgment on the claims or defenses or on the client himself. Indeed, from a Marxist-Leninist standpoint the lawyer's role appears especially dubious when he is defense counsel in a criminal case: the client has been charged by a responsible state official with the commission of an offense against society. . . .

Barry & Berman, *supra*, at 11-12. Professor Osakawe suggests that the legal system presently used in the Soviet Union is in fact a blend of the adversary system of England and the United States and the inquisitorial system of continental Europe.

In the United States, lawyers resolve disputes while primarily working in a system resting upon the same model as that employed in American politics and economics. That model is, or at least was until the early part of the twentieth century, a model resting on the tenets of classical liberalism. Conversely, in socialist countries, lawyers resolve disputes while primarily working in a system resting on the same model as that employed in politics and economics in those countries. The model in those countries was, at least until the last few years, a model that built on the tenets of civic humanism.